In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 153

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CHARLES ELMORE CROPLEY
CLERK

LUCKENBACH STEAMSHIP COMPANY, INC. (a corporation), as Owner of the Steamship "Edward Luckenbach",

Petitioner,

vs.

SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI (a corporation), NAVIGAZIONE LIBERA TRIESTINA, S. A. (a corporation), SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI (a corporation) (Owners and Underwriters of the Motorship "Feltre"),

HAWAII LIQUOR COMPANY, LIMITED, et al. (Cargo Claimants),

Respondents.

BRIEF FOR RESPONDENTS, SOCIETA ANONIMA PARTECIPAZIONI INDUSTRIALI COMMERCIALI, NAVIGAZIONE LIBERA TRIESTINA, S. A., AND SPETT SOCIETA ANONIMA DI SICURATA FRA ARMATORI, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF POINTS.

No question is presented by the petition for writ of certiorari justifying the granting of petition.

1. The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same matter.

2. No important question of federal law not heretofore settled by this Honorable Court is involved.

3. No question of local law is involved.

4. The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

RESPONDENTS' SUMMARY OF MATERIAL INVOLVED.

This case involves the question of responsibility for collision which occurred between petitioner's steamer the "Edward Luckenbach" and the motorship "Feltre" on February 17, 1937, in the Columbia River upstream from Longview, Washington (R. 291). The collision caused damage to both vessels and loss and damage to cargo aboard the "Feltre" (R. 293).

A. THE FACTS.

The general facts showing the navigation of the two vessels are sufficiently set forth in the opinion of the Circuit Court of Appeals (R. 1416-1427; 127 F. (2d) 86-90). The two vessels sighted each other while several miles apart. Visibility was good although rain and wind conditions existed. No other vessels were in the vicinity to in-

terfere with the navigation of these two vessels and the channel was of ample width—over 2,000 feet wide—to permit both vessels to safely maneuver.

The "Feltre" was proceeding downstream with the wind astern on the Upper Cottonwood Island Range until about one-half minute before the impact. The "Luckenbach" was proceeding upstream on her left or wrong side of the channel and crossed the projected range of the "Feltre". Thereupon the "Feltre" blew a two-blast signal and turned left in an endeavor made *in extremis* to avoid collision with the "Luckenbach". The maneuver was unsuccessful and the "Luckenbach" crashed into the starboard side of the "Feltre".

B. FINDINGS OF FACT AND DECREE.

1. The matter was tried before a Special Master, part of the testimony being submitted by deposition and the remainder by witnesses appearing in person. Thereafter the matter was extensively briefed and after being submitted the Special Master found both vessels at fault. The District Court approved the findings of fact of the Special Master and made the following findings of fact with respect to the petitioner (R. 293-294):

> "The steamship Edward Luckenbach and petitioner were guilty in the following respects of negligent navigation and faults which contributed to and caused the said collision and consequent damage:
>
> 1. She violated the narrow channel rule in that she navigated too far to her own left and crossed the Upper Cottonwood Island Range.
>
> 2. She failed seasonably to sound the danger signal and failed to stop and reverse under the attendant circumstances and conditions.

3. She proceeded at an immoderate rate of speed for the conditions prevailing.

4. She failed, in a channel of ample width to enable the vessels to pass safely without crowding, to navigate so as to allow a safe margin for passing the Feltre.

5. She failed to take any compass bearings of the approaching Feltre, a precaution which would have permitted her to observe a safer margin in passing the Feltre."

2. Subsequently the case was appealed by petitioner to the Circuit Court of Appeals for the Ninth Circuit and a cross-appeal was taken by these respondents. In the Circuit Court of Appeals the matter was argued at length and exhaustively briefed and the decision of the District Court was affirmed.

After quoting the District Court's findings of fault by petitioner as well as the findings of fault on the part of the "Feltre", the Circuit Court of Appeals stated (R. 1421):

> "We see no sufficient reason for disturbing these findings. While the evidence is in sharp conflict the weight of it appears to us to require an affirmance."

3. The present petition is presented by petitioner for the sole purpose of obtaining a fourth review of the disputed questions of fact after decisions by the Special Master, the District Court and the Circuit Court of Appeals for the Ninth Circuit have squarely held on the factual evidence that the "Luckenbach" was at fault. No new or novel questions of law are involved in this petition.

The case involves only a determination of disputed questions of fact. The findings of fault against the "Luckenbach" are clearly and amply supported by testimony of disinterested witnesses as well as by the testimony by the "Luckenbach's" own witnesses. The record as a whole established that the petitioner's vessel wrongfully crossed the course of the "Feltre" (R. 1426) and committed the other faults specified in the findings of fact.

The decision of the dissenting judge in the Circuit Court of Appeals indicates that in his mind the point of collision is virtually decisive of the case (R. 1435). The dissenting judge concluded that the point of impact was nearly 300 feet to the left of the range (or about 150 feet into the "Luckenbach's" side of the channel). That judge concluded that the "Feltre" sank at a point only 55 feet downstream and 15 feet to the left of the point where the impact occurred. Such conclusion is reached directly in the face of the facts that the natural effect of the impact of the "Luckenbach" on the "Feltre's" starboard side at No. 2 hatch would force the "Feltre" to its left; that the "Feltre" was proceeding downstream at a speed of about 12 knots with a following wind and tide; that a vessel travelling at such speed traverses about 20 feet each second; and that it is a physical impossibility for the oiler and fireman to have escaped from the fireroom to the weather deck in the three seconds (55 feet at 20 feet per second) which, under his theory, elapsed between the time of impact and the time the "Feltre" came to rest on the bottom, and affirmative testimony that the "Feltre" was proceeding on the range until it blew its two-blast signal and swung its wheel to the left.

Further, the contention of the dissenting judge is properly answered by the majority opinion as follows (R. 1423-1424):

> "From these physical facts the Luckenbach insists that the Feltre sank practically in the same spot as that at which the collision occurred. However, the master and the trial court accepted the testimony of Pilot Turppa that the Feltre did not sink immediately, but came to rest on the bottom in about her own length, or about 450 or 500 feet. There are good reasons for believing that the estimate approximates the truth. A watchman and an oiler, who were in the engine room of the Feltre at the time of the collision, had ample time in which to go from the engine room to the deck after the crash occurred. It may well be that the wreckage did not drop into the water until the vessels became separated. In any event it is fairly clear that when the vessels collided the Luckenbach was being navigated too close to mid-channel to permit of a safe margin of passing, and this despite the obvious fact that the channel was of ample width to allow ships to pass without at all crowding each other. No other vessels were in the vicinity to complicate the situation."

4. Petitioner's declared basis for requesting allowance of the petition on the ground that the decision below conflicts with decisions of this Court and the Circuit Courts of Appeals (Petition, p. 12) is without merit. The only questions raised by petitioner are questions of fact and on this score petitioner has had three full and complete hearings.

Three lower Courts have found that both the "Luckenbach" and the "Feltre" were at fault in material respects

proximately contributing to the accident. In such a situation the major and minor fault rule is inapplicable. Major faults were committed by the "Luckenbach". These faults were proximate and not remote. The "Luckenbach" was an active and not a passive participant in the accident and under such circumstances there is neither reason nor authority supporting the application of the major and minor fault rule.

5. Were this petition to be granted it would seem to follow that the entire fourteen hundred page record should be reviewed in order to determine whether the "Luckenbach" was at fault or whether the "Feltre" was at fault or whether they were both at fault. The "Feltre" has consistently urged throughout the entire proceedings that it was entirely without fault in the matter. The "Luckenbach" has likewise taken the same stand. The contentions of each vessel on disputed findings of fact have been uniformly rejected by the Special Master, the District Court and the Circuit Court of Appeals for the Ninth Circuit. In each instance the holding was that both vessels were at fault in material respects.

6. This Honorable Court will only reject the uniform findings of fact of the lower Courts upon clear and convincing proof of error (*Just v. Chambers*, 312 U. S. 383, 385). Such error has not been established.

SUMMARY OF ARGUMENT.

The concurent findings of the three Courts below that petitioner's vessel violated the narrow channel rule is supported by conclusive evidence.

1. The testimony of petitioner's own witnesses establishes its fault.

2. Petitioner's own records establish its fault.

3. Competent, disinterested witnesses saw the "Luckenbach" proceeding up the wrong side of the channel.

4. The "Feltre" witnesses saw the "Luckenbach" cross the "Feltre's" range course.

The authorities cited by petitioner do not in any way conflict with the decision of the trial Courts.

1. Petitioner's vessel was found guilty of a major fault on clear evidence.

2. Petitioner was accorded a trial *de novo* in the Circuit Court of Appeals.

The dissenting opinion is based on assumptions of fact which are not supported by the record.

CONCLUSION.

It is respectfully requested that this Honorable Court deny the writ of certiorari.

Dated, San Francisco, California,
July 24, 1942.

W. F. WILLIAMSON,
Counsel for Respondents,
Owners and Underwriters of the
Motorship "Feltre".

CLARENCE G. MORSE,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this.....day of July, 1942.

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Counsel for Petitioner,
Luckenbach Steamship Company, Inc.

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Counsel for Respondents,
Hawaii Liquor Company and 64 others,
Cargo Claimants.